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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 176

LEONARD SALDANA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

Opinions Below

The District Court did not render an opinion. The opinion of the Court of Appeals (R. 104-110) has been reported at 274 F. 2d 352.

Jurisdiction

The judgment of the Court of Appeals (R. 111) was entered on December 7, 1959. The petition for writ of certiorari was granted on June 27, 1960 (R. 112; 362 U.S. 838). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions, Statute and Rules Involved

The Constitution of the United States provides in pertinent part as follows:

Amendment V:

> " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property without due process of law; . . . "

Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . "

The pertinent part of Section 105 of the Narcotic Control Act of 1956, 70 Stat. 570, 21 U.S.C. § 174 provides as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction un-

less the defendant explains the possession to the satisfaction of the jury."

Rule 32(a) of the Federal Rules of Criminal Procedure, 327 U.S. 854, 18 U.S.C. Appendix, provides in pertinent part:

"Sentence shall be imposed without unreasonable delay..."

Questions Presented

1. Does postponement of sentencing, at the Government's request and over defendant's objection, violate defendant's rights under the Sixth Amendment and under Rule 32(a) of the Federal Rules of Criminal Procedure, where the purpose of the postponement is to preclude defendant's adverse testimony at the subsequent trial of another person?

2. Where the court accepts a plea of guilty voluntarily and intelligently made upon advice of counsel, may such plea be vacated over defendant's objection? If such a plea may be so vacated under some circumstances, may this be done by a judge other than the one who accepted the plea, without a fair inquiry into the facts, merely because he purports to sense "the appearance of a deal"? Does jeopardy attach upon acceptance of a plea of guilty and thus bar further trial for the offenses involved? Where an indictment charges one count of conspiracy and four substantive counts comprehending the overt acts of such conspiracy, does disposition of the conspiracy count and one substantive count by guilty plea, with the understanding that the other counts will be dismissed, bar a subsequent trial on those other counts?

3. Entrapment being the only proper issue for the jury, is defendant denied a fair trial where the Government did

not make the informer available to defense counsel until just before defense counsel called the informer as a witness; where the informer refused, after being counseled by the Assistant United States Attorney, to discuss the case with defense counsel; and where the trial court refused to allow defendant to treat the informer as a hostile witness and refused to allow defendant to inquire fully into the relationship between the Government and the informer?

4. Does the throwing of narcotics by an arrested person toward the arresting officer, following a gunpoint arrest, constitute a "sale" within the meaning of 21 U.S.C. § 174?

5. Does the law recognize two kinds of entrapment as set forth in the jury charge, namely, "lawful entrapment" and "unlawful entrapment", and further does the entrapment instruction misstate the burden of proof re entrapment?

Statement of the Case

Indictment

The indictment is in five counts, each alleging a violation of 21 U.S.C. § 174. Count one charges that from April 28, 1958 to June 11, 1958 petitioner and one Palomino conspired to receive, conceal, sell and facilitate the transportation, concealment and sale of narcotic drugs (R. 1-2).

Count two charges that on or about April 28, 1958 petitioner and Palomino knowingly and unlawfully sold and facilitated the sale to one Jayme Licuanan of one ounce, 423 grains of a narcotic drug, knowing the same had been unlawfully imported (R. 2). Counts three, four and five are substantially similar to count two, differing only in the allegation of date of alleged sale, the amount of narcotic

drug involved, and, with respect to count five, the addition of Victor Segura as a purchaser (R. 2-3).

The deliveries involved in counts two, three and five are specified as the overt acts to effect the conspiracy charged in count one.*

Plea of Guilty, Delay in Sentencing, and Vacation of Plea

Petitioner was arraigned before District Judge Thurmond Clarke on June 16, 1958. At that time, petitioner, being indigent, was assigned counsel, and, upon such appointment, Judge Clarke suggested that petitioner plead not guilty since his codefendant Palomino had pleaded not guilty (R. 12-13). Accordingly, petitioner pleaded not guilty to all five counts (R. 13).

Subsequently, after full consultation with counsel, petitioner determined to plead guilty. Counsel then inquired of the Assistant United States Attorney as to the plea which the Government would accept. Counsel was informed that in cases of this type the standard practice was to consent to a plea of guilty on two counts and to dismiss the remaining counts, and that the Government would do so in this case (R. 27).

On June 26, 1958, petitioner, by his counsel, moved to withdraw the plea theretofore entered. Such motion was made before Judge Clarke, as judge then presiding over the master criminal calendar. With permission of the court, petitioner withdrew his plea of not guilty on counts one and two and pleaded guilty to those counts (R. 4; R. 15).

* The delivery on May 13, 1958 involved in count four was within the conspiracy from April 28, 1958 to June 11, 1958 comprehended by count one, and apparently the failure to specify that delivery among the overt acts specified in count one was an inadvertence.

Following acceptance of the plea, petitioner requested immediate sentencing, pointing out to the court that the time served between plea and sentencing was time for which he would get no credit (R. 15-16). The court then clearly indicated that a five-year sentence would be imposed on each of the two counts to run concurrently and to commence immediately, and that the other counts would be dismissed (R. 16). At this point, the Government objected. Its objection was not to the length of the sentence but solely to the formal completion of sentencing procedures prior to petitioner's testifying at the trial of Palomino (R. 16). Over petitioner's objection (R. 16), the court delayed the formal completion of sentencing procedures until a date after Palomino's trial, but twice thereafter repeated that its decision to sentence petitioner to five years on each count, to run concurrently, was final.* The formal completion of the dismissal of the other counts was likewise delayed (R. 17).

On July 9, 1958, at a proceeding concerned with Palomino alone, and in the absence of petitioner and petitioner's counsel and of any counsel for the Government, District Judge Peirson Hall ordered petitioner transferred before him for sentencing (R. 4-5). Eventually (R. 5; R. 18-20) petitioner's cause was continued to July 29th, the time to which Palomino's trial had been continued.

On July 29th, Judge Hall was informed that Palomino had fled the jurisdiction, but that Palomino's codefendant, petitioner, was in court (R. 21-23). Upon being advised that petitioner was there only for sentencing, Judge Hall an-

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* Judge Clarke said, referring to his earlier statement as to the length of sentence made following acceptance of the guilty plea:

"Well, I will keep my word and I will make it five years on each count, to run concurrently, on the 21st, and we will have him here on the 21st . . ." (R. 17).

"I will keep my word with you at that time. It will be five years on each count, to run concurrently" (R. 17).

nounced that he was not going to sentence petitioner at that time (R. 23). When petitioner's counsel then sought to fully advise Judge Hall as to what had transpired prior to that date, Judge Hall, on his own motion and over petitioner's objections, vacated petitioner's guilty plea, ordered that a plea of not guilty be entered as to all five counts of the indictment, and set the case for trial in his court (R. 23-25).

The ground relied on by Judge Hall for his action was that Judge Clarke's acceptance of the guilty plea "Apparently . . . smacks too much of having the appearance of a bargain. . . . That if [Saldana] would plead guilty, he would get five years" (R. 24). Presumably the court had in mind a bargain to which the first district judge was a party, since the type of arrangement between the Government and petitioner's court-appointed counsel is common and is favored as a matter of judicial policy.

There was in fact no bargain between the first judge and petitioner or his counsel (R. 26-29). Judge Hall in vacating the plea did not purport to rely on the actual existence of *any* bargain, only on the appearance of one (R. 24). There was in fact no appearance of any bargain (R. 23-24).

In proceedings requested by petitioner on August 1, 1958, petitioner unsuccessfully reiterated his objections to the court's actions of July 29, 1958 (R. 26-29). Judge Hall denied a motion to return the case to Judge Clarke (R. 29) and refused to accept petitioner's offer to reinstate his pleas of guilty to counts one and two (R. 29).

Petitioner's objection to the vacation of his guilty plea and to the holding of the trial was reiterated immediately prior to the impaneling of the jury (R. 30-31).

Evidence

The undisputed evidence adduced at the trial shows the following facts:

(1) On April 28, 1958, a government agent (Licuanan) and a confidential informer (Singh), both previously unknown to petitioner, approached petitioner;

(2) they bore a note (R. 126) from petitioner's cousin addressed to petitioner which stated that the cousin was in jail and that Singh was going to help raise bail;

(3) Licuanan pretended that he was a peddler looking for a source of supply and that he would use some of the profits to help the cousin;

(4) Licuanan sought from petitioner an introduction to one Pancho, a supplier;

(5) at first, petitioner demurred to making such introduction (the evidence is in conflict as to his reasons for so doing);

(6) following further discussion, petitioner then made a phone call and informed Licuanan that he should return that evening;

(7) that evening petitioner delivered narcotics to Licuanan;

(8) as a result of further requests from Licuanan, petitioner delivered narcotics to Licuanan on May 7, 1958 and on May 13, 1958.

As a result of further overtures by Licuanan, arrangements were made for Licuanan to obtain narcotics from petitioner on May 21, 1958. However, the uncontroverted evidence given by the Government's witnesses shows

(i) that Licuanan pulled his gun and placed petitioner under arrest while petitioner still had possession of the narcotics and before petitioner made any attempt to transfer the drug to anyone, and

(ii) that thereafter petitioner threw the bag containing the narcotics at Licuanan and attempted to escape.

There was no contention that any money or other consideration had passed to petitioner in connection with this last transaction.

The only issue properly before the jury was entrapment. Other than petitioner and agent Licuanan, the only witness to the events upon which the defense of entrapment was based was the confidential informer, Singh. The Government did not call Singh as a witness. Moreover, at first the Government refused to name the informer (R. 43); subsequently, however, it did produce him on the day that petitioner was to call him as a witness (R. 46). However, Singh, after being counseled by the Assistant United States Attorney, refused to talk to petitioner's counsel (R. 77). Immediately thereafter, when petitioner called Singh to the stand, the court would not allow petitioner to treat Singh as a hostile witness (R. 76-79) and, further, sustained objections to the following questions propounded by petitioner's counsel:

(a) "Would you tell the jury the nature of that conversation [between Singh and petitioner's counsel]?" (irrelevant)* (R. 76);

(b) "Did you tell the petitioner that the reason you wanted to get drugs was in order to raise money to get Julio Contreras out of jail?" (leading) (R. 81);

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*The ground given for the objection is shown in parentheses following the question.

(c) "Are you an employee of the United States government?" (leading and calling for a conclusion) (R. 81);

(d) "Will you describe for the jury your present relations with the United States government?" (too remote) (R. 81);

(e) "Are you presently engaged in narcotic activity on behalf of the United States government?" (argumentative, irrelevant and immaterial) (R. 81);

(f) "Have you been arrested in the last six months for narcotic violation?" (none) (R. 85).

Furthermore, the court refused to permit an examination of Singh's arm (no foundation) (R. 82), and ruled that petitioner's questions concerning narcotics convictions were limited to Singh's felony convictions (R. 86). In addition, the court had previously sustained the Government's objection, on the ground of irrelevancy and immateriality, to a question addressed to Licuanan as to whether he had engaged in similar transactions accompanied by Singh (R. 54).

Entrapment Instruction

The entire instruction on entrapment is founded upon the proposition explicitly set forth therein that "The law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment".* Further, the entrapment instruction does not mention the burden of proof and in fact directs the jury to decide the issue merely by balancing the evidence. Petitioner's proposed instruction was rejected and petitioner's objection to the given entrapment instruction given was overruled (R. 6; R. 99-101).

* The full instruction (R. 140-141) is set out verbatim as Appendix A of this brief.

Verdict

Petitioner was convicted on counts two, three, four and five (R. 143). Petitioner's motion for judgment of acquittal had previously been granted as to count one (R. 71-72).

Sentence

Petitioner was sentenced to a total of twenty years imprisonment, as follows: Ten years on count five, five years on count four, five years on count three, all to run consecutively, and five years on count two,* to run concurrently with the sentence on count three (R. 8-9).

Appeal

The United States Court of Appeals for the Ninth Circuit affirmed petitioner's conviction (R. 104-106), Circuit Judge Hamley dissenting in part (R. 107-110).

Summary of Argument

1. The postponement of sentencing, at the Government's request and over petitioner's objection, for the purpose of precluding petitioner's adverse testimony at the trial of another person constitutes a denial of a "speedy trial" under the Sixth Amendment to the Constitution and an "unreasonable delay" in sentencing under Rule 32(a) of the Federal Rules of Criminal Procedure. Sentencing proceedings are comprehended by "speedy trial." Delays caused by the deliberate act of the Government are unlawful, particularly where, as here, the delay is for an improper purpose. The practice of postponing sentencing until after the de-

* Initially petitioner's sentence on count two was improperly suspended (R. 7-8), but this oversight was corrected at petitioner's instance.

fendant testifies at another person's trial encourages perjury and should be condemned by this Court.

The postponement prejudiced petitioner in several respects, including his subjection to a trial despite his prior plea of guilty and the imposition of a 20-year sentence in lieu of the five-year term announced by the district court.

2. The trial and imposition of sentence following the court's vacation of petitioner's plea of guilty was unlawful. There is no power in the district court to vacate a duly accepted plea of guilty over the objections of the defendant. Historically, the courts had no authority to refuse to accept pleas of guilty. *A fortiori*, there was no authority to vacate such pleas once accepted. Rule 11 of the Federal Rules of Criminal Procedure has modified the common law by giving district courts authority to refuse to accept guilty pleas. However, no modification has been made with respect to vacation.

Pleas of guilty constitute an essential part of the administration of the criminal law. Ninety per cent of the criminal prosecutions in the federal courts are disposed of in this manner. A defendant having so pleaded, has been "convicted"; the court has nothing to do but enter judgment and impose sentence. The defendant may not withdraw his plea unless he can demonstrate that it was obtained by fraud, fear, or in some similar vitiating manner. Even a showing of innocence is not in itself grounds for withdrawal. Under these circumstances, the defendant, having pleaded, is entitled to have that plea stand. He has made his choice and has placed himself once in jeopardy. The court having acquiesced in that conviction is not thereafter free to rewrite the record and subject him to further trial.

Assuming *arguendo* that there is some authority in the district court to vacate a defendant's plea of guilty over

his objections, the only circumstances which would justify such action are those which affect the validity of the making of the plea—e.g., fraud, fear, ignorance or inadvertence. Here the vacation constituted a clear abuse of discretion. The only ground relied upon by Judge Hall was that Judge Clarke's acceptance of the plea, "Apparently . . . smacks too much of having the appearance of a bargain. . . . That if [petitioner] would plead guilty, he would get five years" (R. 24). However, the mere "appearance" of a bargain cannot justify such vacation. More important, there was no bargain, and there was no appearance of any bargain; and the record so reflects.

Further, the procedures used to vacate petitioner's plea violate standards of due process. No investigation as to the facts was made by Judge Hall, and no hearing was afforded petitioner, notwithstanding the fact that Judge Hall had been informed that there had been no discussion or understanding of any kind with Judge Clarke prior to the time he accepted petitioner's guilty plea.

Regardless of the district court's authority to vacate petitioner's guilty plea, the original acceptance of that plea barred any further trial. Having been placed once in jeopardy by that plea, petitioner could not be subjected to further trial. Jeopardy attaches at the time the plea is accepted. Such was the view of Blackstone and such is the rule today.

The acceptance of the pleas on counts one and two barred further prosecution on counts three, four and five as well. Acceptance of a guilty plea under the circumstances here involved constitutes a disposition of all charges contained in the indictment. That formal dismissal was delayed is immaterial. The policy of expediting criminal proceedings by accepting guilty pleas to certain counts requires that further trial on the remaining counts be barred. The Double

Jeopardy clause precludes successive prosecutions for a series of related acts having a common purpose or design. This rule is applicable to prosecutions after conviction by trial, and it is applicable to counts which have been disposed of in the course of obtaining a conviction by plea. This is particularly true where the conviction is upon a conspiracy count which expressly comprehends substantive offenses. Thereafter those same substantive offenses may not be made the subject of additional prosecution.

Fundamental fairness and the orderly administration of the criminal law prohibit the sentencing of petitioner to a term in excess of five years. A five-year sentence was announced by the district court. Formal imposition was delayed for an improper purpose over petitioner's objection. The good word and good faith of the court require that no sentence in excess of the announced sentence be imposed.

3. Petitioner was denied a fair opportunity to determine and test vital evidence within the knowledge of a key witness to the defense of entrapment—the confidential informer who set up the transactions charged. The assistant United States Attorney's counselling of that witness, Roy Singh, with respect to his discussing the case with petitioner's counsel was a violation of due process under the circumstances here present. Although the Government failed to call Singh, its own agent, as a witness, thus compelling petitioner to call him as a part of his defense, the trial court refused to permit petitioner to treat Singh as a hostile witness *ab initio*, refused to allow petitioner to inquire into facts material to show hostility, and sustained objections to questions designed to show bias. In each respect, the trial court was in error.

4. The denial of petitioner's motion for judgment of acquittal as to count five was error. Count five charges a

"sale" of narcotics. The uncontroverted evidence demonstrates as a matter of law that no "sale" occurred. The undisputed facts are that, after petitioner was arrested at gunpoint, he threw the bag containing narcotics at the arresting officer and fled.

The Court of Appeals held that no "sale" had occurred as of the time the arrest was made, but that the throwing of narcotics after the gunpoint arrest created a question of fact for the jury as to whether petitioner intended to consummate the "sale" by that act. As the dissenting Judge correctly stated, whether there was sufficient circumstantial evidence of the requisite intent was a matter of law. He then concluded, "I do not find a single circumstance surrounding the event which would tend to show that Saldana had a deliberate and voluntary intention of consummating the sale."

Furthermore, the uncontroverted evidence shows that a cash sale was contemplated and that each prior transaction had constituted a cash sale; yet there was no evidence of any consideration passing to petitioner in connection with the narcotics involved in the fifth count.

5. The district court's entrapment instruction, given over petitioner's objection, was erroneous in two respects. That instruction was couched in terms of "lawful entrapment" and "unlawful entrapment". The defense involved is simply "entrapment", and the terms "lawful" and "unlawful" have no applicability to such defense. Entrapment is a valid defense whether the conduct of the entrappers was lawful or unlawful. Such an instruction can only confuse and mislead the jury.

Furthermore, the entrapment instruction directs the jury to decide the entrapment issue merely by balancing the evidence. In so doing, the instruction misleads the jury as to

the burden of proof. Once inducement by the Government is shown, the burden is on the Government to prove beyond a reasonable doubt that the inducement was not the cause or creator of the crime. This allocation of the burden of proof must be expressly set forth in the entrapment instruction; a mere general instruction re burden of proof elsewhere in the charge is not sufficient.

I.

The Postponement of Sentencing for an Improper Purpose, at the Government's Request and Over Petitioner's Objection, Violated Petitioner's Rights Under the Sixth Amendment and Under Rule 32(a) of the Federal Rules of Criminal Procedure.

Following acceptance by Judge Clarke of petitioner's guilty plea, petitioner, through his court-appointed attorney, requested immediate sentencing, pointing out that the time served between plea and sentencing was time for which he would receive no credit toward service of his sentence (R. 16). The court then clearly indicated that a five-year sentence would be imposed on each of counts one and two, to run concurrently and to commence immediately, and that the other counts would be dismissed (R. 16). At this point, the Government requested that formal imposition of sentence be delayed, and the request was granted by the court over petitioner's objection. In making the request, the Government indicated no concern over the length of sentence. Rather, it was motivated by a desire to protect its interests in another prosecution. It sought to preclude possible adverse testimony by petitioner at that other trial.*

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* The Government, in requesting the delay, stated:

"... policywise, where there is another defendant who is going to stand trial, ... it is usually advisable to not sentence one defendant first, in that we don't know what his

The Government's interest was protected;* however, this was achieved at the expense of petitioner, who was seriously prejudiced by the delay in at least three respects:

(1) He was required to serve an additional two months of "dead time," i.e., his sentence commenced on August 18, 1958, rather than on June 26, 1958, and he was in jail throughout the interim;

(2) He was subjected to the ordeal of a pointless trial which he otherwise would have avoided; and

(3) He was ordered to serve a 20-year sentence in lieu of the five-year sentence he would otherwise have served.**

The delay in the formal imposition of petitioner's sentence violated rights afforded him by the Sixth Amendment and by Rule 32(a) of the Federal Rules of Criminal Procedure. The Sixth Amendment guarantees the right to a "speedy trial." While this court has not decided whether the right to a speedy trial includes the right to a speedy sentence, in *Pollard* v. *United States*, 352 U.S. 354 both the majority and dissenting opinions recognized the existence of this question.†

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intentions are and we don't feel it is permissible to pass sentence now. . . . we never can tell that he is going to appear as a witness" (R. 16).

The court then commented on the request:

"I see. They are afraid that he might get on the stand at the other trial and take all the blame" (R. 16).

* Petitioner did not testify at the other trial. In fact, that trial was never held, since the other person fled the jurisdiction.

** While prejudice was present here, we believe that prejudice need not be shown where a person is deprived of his right to a speedy trial. Cf. *United States* v. *Provoo*, 17 F.R.D. 183, 203 (D.C. Md. 1955), aff'd per curiam 350 U.S. 857.

† The "speedy trial" provisions of the Constitutions of Pennsylvania [Art. I, Sec. 9] and of Virginia [Art. I, Sec. 8] have been

The term "trial" as used in the Sixth Amendment has been held to include sentencing proceedings. For example, a defendant is entitled to counsel at the time of sentence.* A clear expression of the reasons for including sentencing proceedings within the Sixth Amendment trial protections is found in *Thomas* v. *Hunter*, 153 F.2d 834, 839 (10th Cir. 1946), where Judge Huxman said, "To hold that return of verdict or sentence thereafter is no part of the trial is to accord the term trial a very narrow and technical definition when the question under consideration is the violation of human rights and liberty guaranteed by the Constitution." A plea of guilty does not, of course, waive any Sixth Amendment rights other than as to a determination of guilt; all other rights are preserved.** The right to a speedy sentence must apply equally to all convicted persons, regardless of the procedure by which conviction is obtained.

We believe that the proper rule is that the term "speedy trial" includes the entire prosecution of a criminal case. We believe that under the Sixth Amendment every defendant is entitled to a prompt disposition of pending charges so that he may know, without unjustifiable delay, what penalty, if any, will be imposed upon him. Just as a person charged with a crime should not be compelled to live for an indefinite period with the threat of trial hanging over him, so a person convicted of a crime should not be compelled

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held to guarantee the right to a speedy sentence. See *Commonwealth* v. *Ashe*, 368 Pa. 211, 82 Atl. 244, 248 (1951), cert. den. 342 U.S. 862; *Powell* v. *Commonwealth*, 182 Va. 327, 28 S.E.(2d) 687, 692 (1944).

* Cf. *Schwab* v. *Berggren*, 143 U.S. 442; *Hopt* v. *Utah*, 110 U.S. 574.

** E.g., see *United States* v. *Steese*, 144 F.2d 439 (3d Cir. 1944) (the "right to counsel" provision of the Sixth Amendment applies equally to persons convicted by plea of guilty and those convicted by jury).

to live for an indefinite period with the threat of sentence hanging over him.* Fundamental fairness requires that the sentence, as well as the preconviction proceedings, be "speedy" and that an accused, whether acquitted or convicted, be advised promptly of his fate.

However, the constitutional issue need not be met in the instant case, for the trial court's action falls squarely within the prohibition of Rule 32(a). Rule 32(a) requires that "Sentence be imposed without unreasonable delay." **

The *Pollard* case, as well as the "legislative history" † of Rule 32(a) strongly support the view that a delay for the convenience of the Government is "unreasonable." In *Pollard*, this Court said (352 U.S., at 361), "The delay must not be purposeful or oppressive." At page 362, this Court said further, "We do not have in this case circumstances akin to those in Petition of Provoo (citations) where Judge Thomsen found the delay 'caused by the deliberate act of the Government. . . .'" While *United States* v. *Provoo*, 17 F. R. D. 183 (D.C. Md. 1955), which was affirmed per curiam by this Court (350 U.S. 857), held that delay caused by the deliberate act of the Government in bringing a case to trial is unreasonable, the *Pollard* case, citing *Provoo*,

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* See *United States* v. *Dillon*, 183 F.Supp. 541 (S.D.N.Y. 1960), in which the guilty pleas of four defendants had been accepted in 1952, but sentence had not been imposed by the time the other defendants went to trial in 1960.

** Cf. *Pollard* v. *United States*, *supra*, at p. 361, "The time for sentencing is of course not at the will of the judge."

† The pertinent part of the Rule 32(a) is "substantially a restatement" of Rule I of the Criminal Appeals Rules of 1933, 292 U.S. 661. Notes of Advisory Committees on Rules, Note to Subdivision (a) of Rule 32. Rule I prohibited any delay except to permit either (1) a defense motion to vacate the conviction or (2) a presentence investigation where such was deemed required in the interest of justice. Delay for the convenience of the Government was not permitted.

applied the same principle where delay in sentencing was the issue (352 U.S., at 362).

In *Pollard*, this Court found that the delay was inadvertent and not caused by the deliberate act of the Government; it also found that no delay had occurred after discovery of the error and that the petitioner had made no objection to the delay. In the case at bar, however, the entire delay was attributable to the Government's action in insisting that sentencing be postponed until after another person's trial.* All of the delay involved occurred after this deliberate governmental act, and petitioner objected to the delay at the appropriate time. All of the *Pollard* tests are met in this case. Furthermore, not only was the Government's act deliberate, but it was for an improper purpose.

The delay in sentencing petitioner was for an improper purpose and "unreasonable." The sole purpose of the delay was to preclude his adverse testimony at the trial of another person. This practice in no way serves the interests of justice. Not only does such a practice deprive the person awaiting sentence of his own basic rights, but also it encourages him to commit perjury at the trial of another person. A convicted person awaiting sentence must necessarily be influenced by the fact that his own future is in doubt when he is called to the stand. He would ordinarily

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* The fact that the court acceded to the Government's request does not relieve the Government of the responsibility for the consequences of its request. Cf. *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959), in which the Government moved to set aside an illegal sentence. The court went beyond the motion and "purported to vacate the conviction and dismiss the indictment" as well. Later, when a new indictment was brought the defendants raised double jeopardy, and the Second Circuit upheld this contention. In so doing, the court said that not only the setting aside of the sentence but also the vacation of the conviction and dismissal of the indictment were the "government's doing" (p. 208).

be reluctant to give testimony unfavorable to the prosecution. If his attitude is deemed "uncooperative," he knows he will shortly face the prosecutor's wrath. He has little choice but to seek to please the Government. The cause of criminal justice does not benefit from convictions obtained in this manner.

The condemnation by this Court of the practice of using sentences as a club over the head of prospective witnesses would in no way hamper the enforcement of our criminal laws. In the event a witness fails to tell the truth, he may be prosecuted for perjury (18 U.S.C. § 1621; Cf. 18 U.S.C. § 1406). This is the remedy which Congress has adopted for dealing with untruthful witnesses. It is a remedy which provides safeguards for witnesses whose testimony appears false to the prosecution. Congress did not intend that such witnesses be punished by increasing their sentences for other crimes; for this constitutes punishment without trial. Yet this is the only rationale for the practice followed by the Government herein.

We believe that this Court should condemn the practice followed by the prosecution in this case. A delay is reasonable only when its cause is consistent with the interests of justice. Here the delay was for a purpose which is contrary to the interests of justice.

Whatever meaning might be given the word "unreasonable" in the absence of the Sixth Amendment, the commands of that provision compel the conclusion that delay for the purpose here involved cannot be tolerated. So, too, does the proper administration of the criminal law. As was said in *Rosenberg* v. *United States*, 346 U.S. 273, 287:

> "This Court has the responsibility to supervise the administration of criminal justice by the federal judiciary. This includes the duty to see that the laws are not only enforced by fair proceedings, but also that

the punishments prescribed by the laws are enforced with a reasonable degree of promptness and uncertainty."

II.

Petitioner's Trial and Sentence Thereon Was Illegal.

A. The Trial Court Had No Power to Vacate, Over Petitioner's Objections, Petitioner's Duly Accepted Plea of Guilty for the Sole Purpose of Holding a Trial Upon the Identical Charge.

Following the postponement of formal imposition of the five-year sentence announced by District Judge Thurmond Clarke, District Judge Pierson Hall, without notice to the Government or to petitioner, ordered the case transferred to his docket. Subsequently Judge Hall vacated petitioner's guilty plea, ordered that a plea of not guilty be entered as to all five counts, and set the case for trial in his court. Judge Hall's actions were *sua sponte* and over petitioner's objections. The basis for this action was that Judge Clarke's acceptance of the guilty plea "Apparently . . . smacks too much of having the appearance of a bargain . . . That if [petitioner] would plead guilty, he would get five years." Petitioner was thereafter tried before Judge Hall on all counts, and convicted on four counts, despite petitioner's repeated protests as to the legality of the purported vacation and trial. Petitioner was then sentenced to twenty years by Judge Hall.

Judge Hall's action in vacating petitioner's duly accepted plea of guilty and compelling petitioner to submit to trial was unlawful. A court has no authority to vacate a duly accepted plea over a defendant's objection. Such a plea constitutes a conviction, and a defendant, having been convicted, may not subsequently be harassed by repeated at-

tempts to prosecute him. A defendant who has pleaded guilty is in the same position as one who has been convicted by verdict of jury.*

By pleading guilty, a defendant irrevocably commits himself to his chosen course. He may not withdraw that plea unless he can subsequently prove that his entry of the plea was a result of "force, fraud, fear, ignorance, inadvertence or mistake such as would justify the court in concluding that it ought not be permitted to stand." *Friedman* v. *United States*, 200 F.2d 690, 696 (8th Cir. 1952). Having placed himself in this position, the least he is entitled to is that this disposition of his case be final and that he shall not be "twice vexed for the same cause." **

Guilty pleas play a vital role in the orderly administration of justice. More than 90% of all convictions in the federal courts are by such pleas,† and they should be afforded judicial certainty. In the absence of such treatment, the effectiveness of this technique of disposing of criminal charges will inevitably be impaired.

That courts are without authority to vacate pleas of guilty is clear from the historic treatment of such pleas. In the absence of a statute granting specific authority to refuse a

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* In *Kercheval* v. *United States*, 272 U.S. 220, 223, this Court said: "A plea of guilty differs in purpose and effect from a mere admission or extra-judicial confession; it is itself a conviction." In *United States* v. *Sabourin*, 157 F.2d 820 (2d Cir. 1946), *cert. den.*, 329 U.S. 800, the court quoted the above and added: "Thereupon it becomes the duty of the court to impose sentence." (157 F.2d at 821.)

** "Nemo debet bix vexari pro una et eadem causa." See 65 Yale L.J. 339 nn. 7 and 13 (1956).

† See Annual Report of the Director of the Administrative Office of the United States Courts (1958) at 208. Previous reports contain similar figures. The federal experience is similar to that in state courts. See *Orfield*, "Criminal Procedure from Arrest to Appeal" (1947) at 297-298.

guilty plea, courts are required to accept them. This is a "well-established rule of the common law" (Opinion of Justices, 91 Mass. [9 Allen] 585, 586 (1864)). As stated in Clark's Criminal Procedure (2d ed. Mikell 1918), at 429:

> "In the absence of a statutory provision to the contrary, the defendant may plead guilty in a capital case as well as in any other, and the court must pronounce the proper judgment and sentence, though it may be death. It cannot compel him to plead not guilty, and submit to a trial, . . ."

A fortiori, in the absence of statute, a court has no authority to vacate a guilty plea over the accused's objections. As concisely stated in *People* v. *Freiberg*, 137 Misc. 314, 243 N.Y.S. 590 (1930):

> ". . . this court can find no authority permitting the County Court, on its own motion and without the consent of a defendant, to set aside a plea of guilty."

Certainly if a court cannot refuse to accept a guilty plea, it is not free to vacate the plea once accepted. Otherwise, the requirement that the plea must be accepted would be meaningless.

The rule that, in the absence of statute, a court has no authority to refuse to *accept* a plea of guilty is no longer applicable in the federal courts because there is a "statute" applicable, to wit, Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 states that "The court may refuse to accept a plea of guilty. . . ."* By contrast, no statute or rule has been enacted to change the common law rule that

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* "The original common-law view was . . . contrary [to Federal Rule 11.]; if the defendant persisted, the court had to accept the plea." Puttkamer, "Administration of the Criminal Law," (U. Chi. Press; 1953), at 170, n. 17.

a plea of guilty cannot be *vacated* without the defendant's consent. The withdrawal of guilty pleas is treated only by Rule 32(d), but that Rule is applicable solely to withdrawals voluntarily made by defendants.*

There are valid reasons why the Federal Rules of Criminal Procedure permit federal courts to refuse to accept guilty pleas but fail to permit their vacation over a defendant's objection. As stated earlier, once the plea has been accepted, the defendant has been convicted; his position has radically altered in many ways. Consequently he is entitled to rely with certainty on the fact that he will not be subjected to further prosecution. The same rule would be applicable in a case where, following a conviction by jury of a lesser included offense, the court sought to set aside the verdict so that the Government might bring a new indictment charging a higher offense.**

Just as the defendant must make his choice, so must the court. Having once convicted an individual, by plea or verdict, the court may not undo that act without the consent of the individual. If the court wishes to take advantage of the benefits of a plea of guilty, it must also accept whatever burden is involved. If the only burden is that the court cannot renege on its decision in order that the

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* Rule 32(d) is a restatement of Rule II(4) of the Criminal Appeals Rules of 1933, 292 U.S. 661. The 1933 Rules were drawn pursuant to Act, March 8, 1934, c. 49, 48 Stat. 399, which provided, *inter alia*:

"... That nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed."

** As a general rule conviction of a lesser included offense bars subsequent trial of the greater offense. American Law Institute, Administration of the Criminal Law: Double Jeopardy, 137-145 (1935).

defendant may be secure in the knowledge that the charges are finally disposed of, then that burden is not a great one.

Precisely this question was decided in *R.* v. *Grant*, [1936] 2 All Eng. Rep. 1156. There, the defendant had offered a plea of guilty and the plea was accepted. The judge subsequently changed his mind and bound the defendant over to another court for trial. The Court of Criminal Appeal held that a plea of *autrefois convict* should have been entered, and discharged the defendant. The court reasoned that the judge should not have permitted the defendant to plead until the judge "had made up his mind" and that, having done so, the judge was without power to alter his decision.

In addition to the above arguments, another reason exists why federal courts do not have the authority to vacate guilty pleas over defendants' objections. Having convicted a defendant once, the court's authority over him with respect to conviction is exhausted. In *Ex parte Lange*, 85 U.S. 163, this Court held that the commencement of punishment exhausts a court's authority to impose further punishment. In that case the trial court had vacated the sentence initially imposed and sought to impose a different one. This Court said, "Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal is manifest" (85 U.S., at 168).

This Court held that the power of courts to modify their own orders is limited "by the common law, by the Constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain" (85 U.S., at 178). While *Lange* involved a case of double punishment, this Court noted in that decision that the rule prohibiting double punishment also "forbid[s] a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted

or convicted" (85 U.S., at 169). The very principles which preclude a court from modifying an order of sentence without the defendant's consent preclude a court from vacating a conviction without such consent, whether that conviction is obtained by plea or verdict; for in each case, the court's power is exhausted.

In *Lange*, this Court concluded its opinion as follows: "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied" (85 U.S., at 178). Here, the same concern for personal rights requires that this Court hold that the court's authority over petitioner with respect to conviction was exhausted once his plea of guilty had been accepted.

Finally, if the courts may properly be afforded the power, in some circumstances, to vacate pleas over a defendant's objection, then that power must be granted in the same manner the courts were given the power to refuse to accept such pleas—by act of Congress or, equivalently, by amendment of the Federal Rules of Criminal Procedure. In our view, however, the grant of such power would be undesirable.

B. In Any Event, the Court Abused Its Discretion in Vacating Petitioner's Plea of Guilty.

As shown above, the trial court's action in vacating petitioner's guilty plea and entering a plea of not guilty was wholly beyond the court's authority. However, even assuming that the court has authority to vacate a plea

without a defendant's consent under some circumstances, nevertheless the court's action in the case at bar was an abuse of discretion.

Petitioner's guilty plea was voluntary, with full knowledge of the consequences, and upon advice of counsel (R. 27). Following his plea, the court before which he pleaded announced a sentence of five years. The interests of both petitioner and society at large would have been satisfied by the immediate termination of proceedings and petitioner's incarceration. As stated in *Leonard* v. *United States*, 231 F.2d 588, 590 (5th Cir. 1956):

> " . . . There is, of course, an important place in the administration of criminal justice for the guilty plea. There are advantages both to society and to the accused from the willingness of trial courts to accept pleas of guilty when voluntarily and properly made . . . "

This Court also has recognized the policy considerations involved:

> "It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes. Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission . . . " (*Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 276).*

* Compare the statement of Judge Hall in refusing to reconsider his decision vacating the guilty plea: "If this defendant is guilty, he ought to be tried and have a jury determine his guilt" (R. 29).

No federal case has been found in which the court vacated a defendant's plea of guilty over his objections. Accordingly, there is no precedent in federal law setting forth the circumstances under which this may be done. Most of the cases in the state courts do not consider the question of the court's authority and rely instead on the alternate ground of double jeopardy (see subsection D *infra*). However, we believe that if a district court has the authority to vacate guilty pleas under some circumstances, it can only do so in circumstances affecting the fundamental validity or fairness of the offer and acceptance of the plea—such as fraud, fear, ignorance or inadvertence. In *People* v. *Warden of New York City Prison*, 107 N.Y.S. 2d 136 (1951), aff'd 110 N.Y.S. 2d 918 (1952), relator pleaded guilty and was sentenced after promising not to challenge that part of the indictment which charged him as a second offender. He subsequently broke his promise and had the sentence set aside. The County Court vacated relator's guilty plea, over his objection. The appellate court held that relator could not be retried, saying:

> "From these and other authorities it appears that the act of the County Court in this case setting aside the relator's reduced plea was a nullity unless it can be established that fraud or trickery was practiced upon it . . . " (107 N.Y.S. 2d, at 140).

In the case at bar, the only ground given by Judge Hall for his action was that Judge Clarke's acceptance of the guilty plea "Apparently . . . smacks too much of having the appearance of a bargain . . . That if [petitioner] would plead guilty, he would get five years" (R. 24).* The court did not specify the parties to the bargain, the appearance of which it seemed to sense.

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* Judge Hall also mentioned the "interest of justice" (R. 24). This is not a ground, merely a conclusion.

The arrangement between the United States Attorney and indigent petitioner's court-appointed counsel is a common one. The arrangement did not involve any promise or commitment with respect to the length of sentence. It related solely to the acceptance of pleas to a lesser number of counts than the total contained in the indictment and the dismissal of the remaining counts. Such arrangements are favored by "administrative policy" [Note, 64 Yale L.J. 590, 599 (1955)], and are "a practical necessity in criminal administration" [Orfield, "Criminal Procedure from Arrest to Appeal" (1947) 342]. Hence, Judge Hall presumably had in mind a bargain with Judge Clarke.

There was, in fact, no bargain of any sort with Judge Clarke. As counsel informed Judge Hall, Judge Clarke did not in any way indicate the nature of the sentence to any person until he announced the term he had determined in open court, following acceptance of the plea of guilty (R. 23-24, 26-29). There is nothing unusual in the imposition of a five-year sentence for a first offender under the federal narcotics statutes. In view of the above and in the absence of contrary evidence, the court's implications as to a deal or the appearances of a deal were totally unwarranted.*

Judge Hall's vacation of the guilty pleas is contrary to the rule set forth by this Court in *Bute* v. *Illinois*, 333 U.S. 640, 671, that "Doubts should be resolved in favor of the integrity, competence, and proper performance of their official duties by the judge and the state's attorney."

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* Even if there had been an appearance of a bargain with the first judge, the mere *appearance* of a bargain is a collateral matter which does not relate to the fundamental validity or fairness of the conviction. Whatever interests there may be in having courts vacate convictions to defendants' prejudice where there is the mere suspicion of a bargain, such interests must give way to the more important policy that convictions are final and that convicted persons know when their prosecution has terminated.

There was nothing before Judge Hall which even warranted any inference which would tend to rebut this presumption of regularity. Certainly there was nothing before him which did rebut this presumption. Under these circumstances, his vacation of the pleas constituted a clear abuse of discretion.

In addition to the "appearance of a bargain" which the court gave as its reason for vacating petitioner's plea, the court strongly indicated its reliance on additional grounds, clearly inappropriate for the exercise of whatever discretion there may be to vacate a guilty plea. In a colloquy held during the court's explanation of its grounds for vacating the plea, the court noted the number of counts and the total amount of narcotics allegedly involved. This discussion immediately followed a remark by the court concerning the five-year sentence (R. 24; see also R. 29). Judge Hall's remarks (as well as the sentence he later imposed) demonstrate his view that a guilty plea followed by a five-year sentence failed to satisfy the court's individual standards for disposing of the case.

It seems almost unnecessary to state that dissatisfaction with the length of a sentence which the court might feel, under the particular facts, should be imposed following a guilty plea is insufficient reason for vacating that plea and requiring a defendant to undergo a jury trial. In fact, it is difficult to conceive of any reason which would more directly conflict with the rule that a conviction bars additional prosecution and increased punishment.

Numerous cases have held expressly that a defendant's disappointment with length of sentence cannot provide reason for the withdrawal of guilty pleas.* Certainly, if a

* E.g., *Stidham* v. *United States*, 170 F.2d 294, 298 (8th Cir. 1948); *United States* v. *Colonna*, 142 F.2d 210, 213 (3rd Cir. 1944); *Williams* v. *United States*, 192 F.2d 39, 40 (5th Cir. 1951); *United States* v. *Schneer*, 194 F.2d 598, 600 (3rd Cir. 1952).

defendant cannot withdraw a guilty plea because of disappointment with length of sentence, the court should not be permitted to vacate the plea of a person who has been convicted merely because it would prefer, for its own purposes, to impose a longer sentence following a jury trial.*

C. The Procedures Used in Vacating Petitioner's Plea Deprived Petitioner of Due Process of Law.

If this Court should hold that the rights given a defendant by his plea of guilty may be extinguished under certain circumstances, then in any given case this deprivation should be accomplished only by the use of procedures insuring against arbitrary action. Such procedures include the right to examine and cross-examine witnesses and to offer evidence and otherwise to apprise the court of all the facts. *Carter* v. *Kubler*, 320 U.S. 243, 247; *United States* v. *Dillman*, 146 F.2d 572 (5th Cir. 1944).

In the case at bar, a district judge summarily vacated a plea of guilty accepted by another district judge without affording petitioner the above safeguards. In so doing, the second judge made charges which seriously reflect upon the conduct of the other federal judge, an Assistant United States Attorney, and petitioner's court-appointed counsel. Such charges are totally baseless and find no

* *F[illegible]man* v. *United States*, 200 F.2d 690 (8th Cir. 1953) illustrates this parallel. In upholding the trial court's refusal to permit withdrawal of guilty pleas, the court said of the defendants:

> "They were free to let their [not guilty] pleas stand and to have a trial. They were offered the opportunity by the Government to plead guilty to one count of the indictment or to stand trial upon four counts. It is apparent that their [guilty] pleas were voluntarily, understandingly and deliberately entered and that it was only their dissatisfaction with the sentence imposed which caused them to apply for leave to withdraw their [guilty] pleas" (200 F.2d, at 697).

support in the record. They fly in the face of the presumption of regularity which this Court has held must be applied to actions of judges and prosecuting attorneys. See *Bute* v. *Illinois*, 333 U.S. 640, 671, *supra*.

What this Court recently said with respect to another summary proceeding is equally applicable here: "There has not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process." *Slochower* v. *Board of Higher Education of City of New York*, 350 U.S. 551, 559. In *Slochower* this Court held that a teacher who had claimed the Fifth Amendment before a federal investigating committee could not be summarily discharged from employment by the State of New York. This Court stated that New York must "conform to the requirements of due process" (at p. 556) and itself make a proper inquiry into Slochower's fitness. It held that a presumption of unfitness, based on Slochower's assertion of his Fifth Amendment privilege was unwarranted.

In the present case, Judge Hall drew an unwarranted presumption as to the circumstances surrounding the guilty plea without making an adequate investigation into the facts. Instead, he vacated petitioner's plea and subjected him to the ordeal of trial on the basis of an unfounded and ugly suspicion. A defendant in a criminal case is entitled to the use of fairer procedures than those used here.

Judge Hall's failure to hold a hearing or to examine witnesses was most prejudicial. Had he done so, the testimony of all parties would have established the true facts unequivocally. More important, however, as this Court said in discussing the meaning and extent of constitutional protection against action without due process of law, " . . . it has always been recognized that one who has acquired rights by an administrative or judicial proceed-

ing cannot be deprived of them without notice and an opportunity to be heard" [*Garfield* v. *Goldsby*, 211 U.S. 249, 262]. And, as stated in *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 276, "Procedural devices rooted in history were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty, or property.'"

D. Regardless of Whether or Not the Vacation of Petitioner's Guilty Plea Was Proper, Petitioner Was Placed in Jeopardy Upon His Guilty Plea and the Subsequent Trial Was Barred.

Assuming *arguendo* that the district court had the power to vacate petitioner's guilty plea and that it did not abuse its discretion in so doing, nonetheless petitioner had been placed over in jeopardy by his guilty plea, and his subsequent trial placed him in double jeopardy in contravention of the Fifth Amendment.

In *Kercheval* v. *United States*, 274 U.S. 220, this Court held that, where a trial court permitted a defendant to withdraw his plea of guilty, proof of that plea was not admissible in a subsequent trial. *Kercheval* described the legal effect of such a plea as follows: "A plea of guilty differs in purpose and effect from a mere admission of guilt or extra-judicial confession; it is itself a conviction" (274 U.S., at 223). As the Court of Appeals for the Second Circuit said, after quoting the above, "Thereupon it becomes the duty of the court to impose sentence." *United States* v. *Sabourin*, 157 F.2d 820, 821 (2d Cir. 1946).

It is true that a defendant may waive the prior jeopardy of a conviction and thereby consent to a subsequent trial.*

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* *Ball* v. *United States*, 163 U.S. 662.

Where he has been convicted by plea, this may be done by making a motion to withdraw that plea under Rule 32(d) of the Federal Rules of Criminal Procedure. Where he has been convicted by trial, he may waive former jeopardy by making a motion for a new trial under Rule 33 or by taking an appeal under Rule 37. However, in the absence of such waiver by the defendant, the jeopardy which attaches to his prior conviction, whether by plea or trial, cannot be removed.

In *Green* v. *United States*, 355 U.S. 184, this Court held that an appeal from conviction of a lesser offense did not waive the jeopardy which had attached to the implied acquittal of the greater offense. In so holding, this Court set forth many of the applicable double jeopardy principles. An analysis of those principles demonstrates that petitioner's trial was barred by the Fifth Amendment to the Constitution.

The *Green* case reaffirms the rule that double jeopardy is applicable to second trials for the same offense, whether the defendant is punished or not and whether the defendant is acquitted or convicted at the first proceeding. The decision further holds that "it is not even essential that a verdict of guilty or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge" (355 U.S., at 188), since jeopardy attaches when the trial commences. Certainly if jeopardy attaches prior to any finding by a jury, it must attach upon a conviction by plea of guilty. A defendant is put in far greater jeopardy by that plea than he is by the mere commencement of a jury trial. One who has pleaded guilty has "run the gantlet" once.

Furthermore, *Green* explains "the underlying idea" of the Constitutional provision regarding double jeopardy as being the protection against "repeated attempts" by the

Government to convict an individual, "thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity" (355 U.S., at 187). These considerations are applicable to further attempts to prosecute a person who has been convicted by plea of guilty just as much as to further attempts to prosecute a person who has been convicted by trial. It is the second proceeding which the Constitution prohibits; it is that proceeding which violates the rights of the defendant; and his rights are violated regardless of which procedure is used in obtaining the first conviction.

If any doubt remains whether jeopardy attaches on a plea of guilty, it is removed by giving to the Constitutional provision the liberal construction which *Green* deemed required: "The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great Constitutional protections are given a narrow, grudging application they are deprived of much of their significance" (355 U.S., at 198).

The case of *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959), is similar to the instant case. In *Sabella*, the defendants pleaded guilty to a narcotics offense and were sentenced. The defendants then filed writs of habeas corpus seeking to have the sentences set aside on the grounds that they were illegal. The Government agreed and moved for vacation of sentence. The district court vacated the sentence, and also, on its own, set aside the judgment of conviction and dismissed the indictment. When a new indictment was brought, defendants raised former jeopardy as a bar. The court of appeals assumed that, in view of the illegality of the sentence, defendant was not placed in jeopardy by the sentence and the time served thereunder. However, the court held that the previous conviction upon

guilty plea *did* place defendant in jeopardy and thus barred subsequent trial.*

The holding of the *Sabella* case that conviction upon plea of guilty places a defendant in jeopardy has been consistently supported by other courts. E.g., see *R.* v. *Grant*, (1936) 2 All Eng. Rep. 1156; *Markiewicz* v. *Black*, 138 Colo. 128, 330 P.2d 539 (1958); *People* v. *Mims*, 136 Cal. App. 2d 828, 289 P.2d 539 (1955); *United States* v. *Lewis*, 114 F. Supp. 512 (N.D. Tex. 1953); *People* v. *Warden of New York City Prison*, 107 N.Y.S. 2d 136 (1951), aff'd 110 N.Y.S. 2d 918 (1952); *State* v. *Thompson*, 76 N. Dak. 125, 34 N.W. 2d 80 (1948); *Belter* v. *State*, 178 Wis. 57, 189 N.W. 270 (1922); *Boswell* v. *State*, 111 Ind. 47, 11 N.E. 788 (1887); *People* v. *Goldstein*, 32 Cal. 432 (1867).

The fact that a formal judgment of conviction had been entered in *Sabella* and not in the instant case is without significance in determining whether jeopardy has attached. As pointed out by this Court in *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927), it is the plea, not the judgment or sentence, which constitutes the conviction.**

This is in accord with the historic view.† Blackstone says that "the plea of autrefois convict, or a former conviction for the same identical crime, though no judgment was ever given or perhaps ever will be (being suspended by the benefit of clergy or other causes), is a good plea in bar

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* The court so held even though the defendants did not object to the vacation of the original judgment of conviction. The vacation of petitioner's guilty plea, however, was over his vigorous and repeated objections.

** Cf. *Kepner* v. *United States*, 195 U.S. 100, 130 (1904):

"It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict. . . ."

† E.g., *People* v. *Goldstein*, 32 Cal. 432 (1867); *Boswell* v. *State*, 111 Ind. 47, 11 N.E. 788 (1887).

to an indictment" (4 Commentaries 336).* And, as stated in *Green*, the commentaries "greatly influenced the generation that adopted the Constitution" (355 U.S., at 187).**

That the plea, and not the judgment or sentence, constitutes the conviction, is also the modern view. In *Ruaion* v. *United States*, 274 F.2d 305 (6th Cir. 1959) the defendant had pleaded guilty to an offense in one federal district and his plea had been accepted by the court "but judgment was at that time reserved" (274 F.2d, at 305). Prior to the time any further action was taken upon that plea, he was tried on another indictment in another district. He offered his guilty plea in bar, alleging double jeopardy. The court of appeals rejected the Government's argument that there was no jeopardy until judgment was entered, saying that jeopardy attaches at the time the plea is made.†

Similarly, the American Law Institute, in setting forth the rule that a prosecution resulting in a "conviction" bars another prosecution for the same offense, defines a plea of guilty accepted by the court as such a conviction. The entry of a judgment is considered immaterial, unless the failure to enter judgment was brought about by a motion of the defendant. A.L.I. Model Penal Code, Tentative Draft No. 5 (1956) § 1.09.

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* Cf. I Inst. 390b, 391a:

"The difference between a man attainted and convicted is, that a man is said convict before he hath judgment; as, if a man be convict by confession, verdict, or recreancie, and when he hath judgment upon the verdict . . . he is said to be attaint."

** Cf. *Sabella*:

"Blackstone spoke with preeminent authority to the framers of the Bill of Rights" (272 F.2d, at 209).

† The court, however, upheld the second conviction on the separate ground that the second trial was for a different offense.

Petitioner was placed once in jeopardy by his plea of guilty. Accordingly, his subsequent trial placed him in double jeopardy and thereby violated his constitutional rights.

E. Where the Indictment Charged One Count of Conspiracy and Four Substantive Counts, Comprehending the Overt Acts of Such Conspiracy, the Disposition of the Conspiracy Count and One Substantive Count by Guilty Plea, With the Understanding That the Other Counts Would Be Dismissed, Barred Petitioner's Subsequent Trial on Those Other Counts.

Petitioner's plea of guilty to two of five counts was accepted by the district court on June 26, 1958. The remaining three counts were held for formal dismissal at time of sentencing. When Judge Hall purported to vacate petitioner's pleas on July 29, 1958, he ordered a plea of not guilty entered on all five counts and set all five counts for trial (R. 5; R. 25).

The acceptance of petitioner's guilty plea on counts one and two constituted a disposition of all pending charges. While counts three, four and five, were ordered "held," for all practical purposes this was tantamount to a dismissal. Had petitioner been sentenced on counts one and two, as he should have been, and had the remaining counts been formally dismissed, no further prosecution on counts three, four and five would have been permitted. Even in the absence of a formal dismissal, however, the same rule is applicable.

We have earlier stressed the practical importance of the use of guilty pleas in the orderly administration of criminal

justice. In many cases defendants plead guilty to certain counts, and other pending charges are dropped.*

The resolution of criminal charges by such pre-plea arrangements with the prosecutor has been termed "a practical necessity in criminal administration" ** and is a practice favored by "administrative policy." † Realistically, the use of this procedure requires that no further prosecution be permitted on the dismissed counts, whether on the same indictment or by subsequent indictment. Otherwise, all meaning is removed from the dismissal, and defendants will no longer obtain the advantages previously afforded by a plea to a lesser number of counts. Present guilty plea practices constitute a recognition of the desirability of an expeditious disposal of criminal cases where guilt is admitted and at the same time guarantee

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* "It is generally known that the great bulk of criminal cases are disposed of by pleas of guilty made after some discussion between the defendant and/or his counsel and the prosecuting attorney in which the latter frequently makes some commitment as to the sentence he will recommend or as to other charges or prosecutions he will drop; if this were not so, or if this Court holds that it may not be so, there would be few inducements for any person to plead guilty." Dissenting opinion of Tuttle, J., in *Shelton* v. *United States*, 242 F.2d 101, 115 (5th Cir. 1957), rev'd on reh. en banc 246 F.2d 571, rev'd 356 U.S. 26.

"... Often the defendant pleads guilty to one or more indictments in consideration that the other indictments be dismissed: [citing cases]." Note, 24 J. of Crim. L. & Criminology 600, 601 (1933-34).

"A fourth method of compromise consists in securing either a dismissal or a reduced penalty at the hands of the prosecuting attorney. ..... he may agree to dismiss a number of pending charges if the accused will plead guilty to one ..." Miller, "The Compromise of Criminal Cases," 1 So.Cal.L.Rev. 1, 6 (1927).

** Orfield, "Criminal Procedure from Arrest to Appeal" (1947), at 342.

† Note, 64 Yale L.J. 590, 599 (1955).

that offenders will in each case receive whatever punishment is deemed necessary. But this result cannot be accomplished, unless the defendant is afforded some benefit also. If the benefit is entirely illusory, and may be taken away at the will of the prosecutor or the court, then defendants would have nothing to gain by a guilty plea.

With respect to petitioner, there is even more involved—namely, the good faith of the district court, since petitioner's plea was entered and accepted in the light of the prevailing practice. The Government and court-appointed counsel for the indigent petitioner agreed upon a final disposition of the case by a plea of guilty on two counts and dismissal of the others. The court approved this disposition of the case and accepted the guilty plea on this basis. No further trial was contemplated.* Under these circumstances, subsequent prosecution of petitioner on counts three, four and five offends fundamental concepts of justice.**

That no formal entry of a dismissal was made as to counts three, four and five is immaterial. As a matter of course, the counts which the court will dismiss are "held" until the formal order is entered at the time of judgment and sentence. Petitioner's part of the pre-plea arrangement with the prosecutor was performed in full, and the court

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* This is unequivocally shown by the following colloquy about petitioner on July 26, 1958 among Judge Hall, Assistant United States Attorney Sheridan, and the clerk:

"Mr. Sheridan: There is a co-defendant in this case, your Honor. I don't know if you wish to dispose of that matter now. He is present.

"The Court: Is it just set for trial as to him, too?

"Mr. Sheridan: No, he entered a plea before Judge Clarke, your Honor.

"The Clerk: He is here for sentence, your Honor" (R. 23).

** See *Frankel* v. *United States*, 131 F.2d 756 (6th Cir. 1942), discussed in subsection G, *infra*.

agreed to the dismissal of the remaining counts. All that remained was the formal, ministerial act of entering the judgment.* For the purposes of this case, those counts should be treated as having been dismissed.

While acceptance of the above arguments would avoid the necessity for considering the constitutional questions involved, petitioner urges that, in any event, the double jeopardy clause barred his subsequent trial on counts three, four and five. We believe that under the circumstances of this case the double jeopardy clause bars separate prosecution of petitioner on some counts contained in the indictment after his guilty plea had been accepted on other counts. Even though certain acts may constitute separate crimes for the purpose of a single prosecution and even though separate punishments may be imposed for such acts following a single trial,** double jeopardy will attach if the Government seeks to obtain convictions for such acts at two separate proceedings. *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959), *supra*. In *Sabella*, Judge Friendly, speaking for the court, noted that the single indictment and successive prosecution problems "differ both historically and practically" (272 F.2d, at 211). Among the reasons given are "the ordeal" of a second prosecution. Therefore, the court held that a second prosecution for a related narcotics offense was barred by a prior conviction, even though the same related offense could properly have been tried and separately punished at the time the prior conviction was obtained.

This Court has never decided what tests should be applied to successive prosecutions in the federal courts for

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* Cf. *United States* v. *Sanges*, 144 U.S. 310; *United States* v. *Ball*, 163 U.S. 662; *Kepner* v. *United States*, 195 U.S. 100.

** Cf. *Blockburger* v. *United States*, 284 U.S. 299; *Gore* v. *United States*, 357 U.S. 386; and *Harris* v. *United States*, 359 U.S. 19.

related offenses. We believe that double jeopardy bars successive prosecutions for a series of acts motivated by a common purpose or plan which results in the repeated commission of the same offense. This is the rule set forth by the American Law Institute* and approved by legal writers.** At least to the extent that the prosecution is aware of a series of similar related offenses which involve testimony by the same witnesses, a defendant is entitled to face the charges at a single trial. In the absence of such a rule, an alleged narcotics violator charged with five separate sales, could be forced to face fifteen separate prosecutions in the federal courts alone.† The opportunities for compelling innocent persons to plead guilty to avoid such harassment are obvious. As the Fifth Amendment offers protection against the embarrassment, expense and ordeals of repeated trials as well as successive punishment,†† the adoption of the suggested rule is clearly necessary.†††

The Solicitor General has recognized the necessity for adoption of the policy urged above. In *Petite* v. *United States*, 361 U.S. 529, the Solicitor General moved to vacate a judgment of conviction with directions to dismiss the indictment, and this Court, with Petite's consent, granted

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* A.L.I. Model Penal Code, Tentative Draft No. 5 (1956) § 1.08(2).

** 11 Stanford Law Review "The Protection From Multiple Trials," 735, 753 (1959). Cf. Comment, 65 Yale Law Journal 339 (1956).

† Separate crimes under 21 U.S.C. § 174, 26 U.S.C. 4704(a) and 26 U.S.C. 4705(a) may be involved in each sale. *Gore* v. *United States*, 357 U.S. 386 (1959).

†† *Green* v. *United States*, 355 U.S. 184, 187.

††† See Separate Opinion of Mr. Justice Brennan in *Abbate* v. *United States*, 359 U.S. 187, 196.

the motion. In *Petite*, the defendant pleaded *nolo contendere* to a conspiracy charge involving perjurious conduct. Thereafter he was indicted and convicted for suborning perjury on the basis of certain acts which "had been relied upon" in the earlier conspiracy indictment. The Solicitor General's motion was based "on the ground that it is the policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged *and tried* together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement'" (361 U.S., at 530; emphasis added).

Comparing the facts of *Petite* with those of the instant case, it is seen that the issues are identical. Petite and petitioner both pleaded to a conspiracy count. Both were subsequently tried for substantive counts comprehended by the conspiracy count.* In *Petite* the overt acts occurred over a four-month period; in the instant case they occurred over a six-week period. In each case, the "transaction" involved several separate substantive offenses occurring at different localities, though the *Petite* offenses involved the acts of several different persons in two different states, while the instant case involves the acts of the same persons in the same city. Under the *Petite* rule, petitioner, after his plea, could not have been subsequently indicted for the overt acts on which he was tried. Since that plea constituted a conviction, he also could not be further prosecuted, even under the same indictment; for,

* The deliveries of narcotics involved in counts two, three and five of the indictment herein are specified as the overt acts to effect the conspiracy alleged in count one. The delivery on May 13, 1958 alleged by count four was clearly within the conspiracy from April 28, 1958 to June 11, 1958 comprehended by count one, and apparently the failure to specify it among the overt acts listed in count one was inadvertent.

as the Solicitor General acknowledged, the several offenses must be "alleged and tried together" (361 U.S., at 530). Therefore, if, as we believe this Court will hold, petitioner's duly accepted plea of guilty on counts one and two constitute a conviction, this plea barred any further trial on counts three, four and five.*

In *Petite*, Mr. Justice Brennan, joined by Mr. Justice Black and Mr. Justice Douglas, stated that the judgment should be reversed on the merits for the reason that "the Double Jeopardy Clause of the Fifth Amendment was an insurmountable barrier to the second prosecution." ** Petitioner's trial, after his conviction by plea of guilty, squarely raises this question again. One of the purposes of the double jeopardy rule is to protect defendants against harassment by successive trials. This purpose is vitiated if successive trials are permitted for various offenses arising out of a single act or series of related acts. Almost every criminal act involves the violation of several statutes, either by the commission of the act itself or as an incident thereto. Unless the proposed rule is adopted by this Court, the government will remain free to make repeated attempts to convict a defendant. Under these circumstances "double jeopardy" would become a meaningless phrase.

If the Government is barred from subjecting a defendant to successive trials for acts which must be joined at one proceeding, this rule would bar a trial on such acts following acceptance of a guilty plea as well as following a trial. The principles involved are identical. In the plea case,

* Even if a trial on counts three, four and five could under some circumstances be proper, petitioner's trial on those counts was unlawful because of their joinder with counts one and two on which he had already been convicted by his guilty plea.

** The Court disposed of the matter upon the Solicitor General's motion without reaching this issue.

however, there is an additional reason for prohibiting additional trials. The defendant has made his choice and subjected himself to conviction with the understanding that he has thereby disposed of all charges. To permit the Government subsequently to bring additional charges arising out of these acts would be to deprive him of the very benefits he has obtained by pleading guilty. This is so whether the additional charges are brought by way of new indictment or as a result of the failure to enter the order of dismissal as to those counts which all parties agreed would be dismissed. In either case the defendant is vexed by that harassment which is prohibited by the Constitution.

F. Petitioner Was Prejudiced by the Subsequent Trial and Sentence.

While it is unnecessary to show specific prejudice arising from the deprivation of a constitutional right, in this case the prejudice to petitioner arising from the act of bringing him to trial after his conviction by plea is apparent. He is now imprisoned for twenty years instead of for the five-year term which would have been imposed but for the occurrences previously related. Even assuming *arguendo* that the court might properly have imposed a sentence in excess of five years in this case if it had not vacated the plea, serious injury still exists as a result of the vacation. The mere holding of a trial on charges upon which a defendant has previously been convicted or acquitted subjects him to embarrassment, ordeal and expense and violates his basic rights.

Furthermore, it is a well-documented fact that conviction after a plea of not guilty customarily results in the imposition of a harsher sentence than is imposed following a plea of guilty. See Comment, 66 Yale L.J. 204 (1956):

Newman, "Pleading Guilty for Considerations: A Study of Bargain Justice," 26 J. Crim. Law 780 (1956); Hall, "Law, Theft and Society" (1935) at 143. This is expressly recognized in the model form of Petition to Enter Plea of Guilty, 20 F.R.D. 231, at 291, composed by Judge Mathes of the district court here involved and extensively used in that district:

> ". . . I respectfully request that the court consider in mitigation of punishment at the time of sentence the fact that by voluntarily pleading 'GUILTY' I have saved the Government and the court the expense and inconvenience of a trial. . . ."

Accordingly, the imposition of sentence after trial, as well as the trial itself, prejudiced petitioner in this case.

G. Fundamental Fairness and the Orderly Administration of the Criminal Law Prohibit Imposition of Any Sentence in Excess of Five Years.

Judge Clarke on June 26, 1958 clearly announced, more than once, that a five-year term would constitute petitioner's punishment. In objecting to immediate formalization of that sentence, the Assistant United States Attorney expressly stated that he did not object to the five-year term. The Court then stated that it was definitely committed to the five-year term—and petitioner had every reason to believe that such was his sentence.*

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* Judge Clarke said, referring to his earlier statement as to the length of sentence made following acceptance of the guilty plea:

> "Well, I will keep my word and I will make it five years on each count, to run concurrently on the 21st, and we will have him here on the 21st . . ."
>
> "I will keep my word with you at that time. It will be five years on each count, to run concurrently" (R. 17).

In *Frankel* v. *United States*, 131 F.2d 756 (6th Cir. 1942) the court considered the question whether the statements "I am indicating a fine of $1500" and "The Court indicates a $1500 fine" constituted imposition of a sentence. The court held that, under the circumstances of the case, they did, saying that there was nothing "tentative" or "exploratory" about the trial judge's announcement. In the present case, there was nothing "tentative" or "exploratory" either. The completion of sentencing formalities was delayed, but the sentence itself was announced. Petitioner then was remanded to custody, held in jail, and sentenced two months later to a sentence four times as long. Under these circumstances, we urge that the announced five-year sentence was increased unlawfully.

First, we believe that under the Fifth Amendment a sentence may not be increased under such circumstances. *Ex parte Lange*, 85 U.S. 163 holds that the Fifth Amendment bars an increase in sentence after a defendant has commenced service of the term imposed. We believe that this rule should be applied in cases such as the case at bar, where petitioner was held in jail for two months, and prevented from commencing service of sentence solely for the convenience of the Government.

Second, aside from any constitutional considerations, fundamental fairness and the orderly administration of justice require that good faith be observed by the courts of the United States. In *Frankel*, the court relied on this principle as an alternative ground for vacating the increased sentence imposed by the trial judge after he had earlier announced his intention of imposing the lesser punishment. In so doing the court said:

> "Respect for and confidence in the judicial process would seem to demand that a court keep faith even with

the most venial of those subject to its decrees" (131 F.2d, at 758).

Here, too, an increased sentence after an announcement of a lesser penalty calls for the application of this principle. In the instant case, the announcement was followed by the court's repeated assurance that its word would be kept. The word of the district court should be enforced by this Court under its supervisory jurisdiction over the administration of criminal justice in the federal courts. As was said in *McNabb* v. *United States*, 318 U.S. 332, 340, this Court's duty is to establish and maintain "civilized standards of procedure and evidence." The treatment of petitioner falls far short of that standard.

III.

Petitioner Was Deprived of a Fair Opportunity to Determine and Test Vital Evidence Within the Knowledge of the Confidential Informer.

This Court has recognized the importance of a defendant's right to determine and test evidence within the knowledge of a confidential informer, particularly in entrapment cases. *Roviaro* v. *United States*, 353 U.S. 53. However, the existence of that right is of little consequence unless a defendant is given a fair opportunity to exercise it. There are various ways in which this opportunity may be denied. In *Roviaro*, the Government refused to disclose the name of the confidential informer. In *People* v. *Kilhoa*, 53 Cal. 2d 748, 349 P.2d 573 (1960), the state delayed prosecution until the informer had left the jurisdiction.* In the

* The California Supreme Court reversed the conviction on this ground, holding that the defendant had been denied due process of law and deprived of a fair trial.

case at bar petitioner's opportunity to determine and test the knowledge of the informer was likewise denied, but by more subtle means.

In the instant case, entrapment was the only proper issue for the jury. The facts material to that defense were those relating to the initial meeting between petitioner, government agent Licuanan, and confidential informer Singh. This was the initial contact between petitioner and the Government. Confidential informer Singh bore a note from petitioner's cousin, who was then in jail, asking for assistance and advising that Singh would help raise money for bail by selling narcotics. As a result of that meeting petitioner sold narcotics to Licuanan. Not only did Singh confer alone with petitioner immediately prior to petitioner's first contact with Licuanan (R. 79), but also Singh was the only person who heard the conversation between petitioner and Licuanan (R. 32; R. 83-84). It was this conversation which constituted petitioner's chief evidence that there had been entrapment and which also constituted the Government's chief evidence that there was no entrapment. The facts about this conversation were vehemently contested (e.g., compare R. 49 with R. 95-97).

Thus, the evidence relating to the defense of entrapment was solely within the knowledge of petitioner, agent Licuanan and the informer, Singh. Licuanan testified on behalf of the Government that there had been no entrapment. The Government did not call Singh as a witness.

The above facts are strikingly similar to those in *Roviaro*. There, too, a confidential informer "helped to set up the criminal occurrence and had played a prominent part in it"; there, too, the confidential informer's "testimony might have disclosed an entrapment"; there, too, the confidential informer was the defendant's "one material witness" (aside

from himself); there, too, the opportunity to cross-examine the federal narcotics agent was "hardly a substitute" (353 U.S., at 64). In *Roviaro* the Government refused to disclose the confidential informer's identity. In the case at bar, while his identity was disclosed, petitioner was deprived of a fair opportunity to determine and test the evidence within his knowledge.

Petitioner was advised of the name of the confidential informer for the first time on the same day petitioner was required to call him as a witness. After being counseled by the Assistant United States Attorney, the confidential informer refused to discuss the case with petitioner's counsel. Despite the fact that Singh was produced and advised by the Assistant United States Attorney, the court refused to permit petitioner to treat him as a hostile witness, refused to permit petitioner to explore thoroughly his relationship with the Government, and generally refused petitioner an effective examination of Singh. Under the circumstances, petitioner was deprived of due process of law.

The Government specifically advised Singh that he need not discuss the case with petitioner's counsel (R. 84-85). Apparently, such counseling was at the instigation of the Government and not at the request of Singh.* The Government's counseling of Singh in this regard was directly contrary to the policy announced in *Roviaro*. As stated therein:

> "The desirability of calling John Doe as a witness, or at least interviewing him in preparation for the trial, was a matter for the accused rather than the Government to decide" (353 U.S., at 64).

* Mr. Singh testified: "Well, they asked me—that you might want to talk to me, and that it was up to me to discuss the case with you, if I wanted to or not" (R. 85).

Such counseling is also directly contrary to the policy, set forth by Judge Colley and adopted by this Court, that "The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons." *Gordon v. United States*, 344 U.S. 414, 419.

The practice of silencing witnesses is not uncommon.* However, this practice is indefensible.** Singh was admittedly a recent user of narcotics (R. 83), an offense for which he had not been prosecuted (R. 86). Under these circumstances the Assistant United States Attorney's "advice" was an effective means of silencing Singh (R. 85).† By so prejudicing petitioner's case, the Government seriously contributed to the deprivation of due process of law herein involved.

As a result of the Government's actions the only method of obtaining the necessary information was for petitioner to compel Singh to take the stand. Singh's testimony was

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* See *Goldstein*, "The State and the Accused: Balance of Advantage in Criminal Procedure", 69 Yale L.J. 1149, 1168 (1960): "If the defendant should wish to use his own resources in searching out those witnesses who have spoken to the police, prosecutor, or grand jury, he will, more often than not, find that they have been advised not to discuss their testimony with him."

** See Note, "The Duty of the Prosecutor to Disclose Exculpatory Evidence", 60 Columbia L. Rev. 858, n. 49 (1960): ". . . The prosecutor must refrain from any action that would serve to deprive the defendant of evidence that would be brought out by the appearance of favorable witnesses."

† Cf. *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 520-521, 327 P.2d 68 (1958): ". . . Of course, Diaz did not have to obey the orders of the sheriff but as a practical matter such an order can be, and was here shown to be, an effective way of keeping a witness's mouth closed. Since the order came from a person connected with the state, we are of the opinion that a court can and should order that person to cease interfering with defense counsel's right to interview a witness."

essential to the full presentation of the facts involved. Having been compelled to call Singh without any opportunity to discuss the case with him prior to the time he took the stand (R. 85), petitioner should have been allowed to treat him as a hostile witness *ab initio*.* At the very least, petitioner should have been allowed to attempt to show bias and to fully explore Singh's relationship with the Government.**

Petitioner's attempt to examine Singh as a hostile witness was denied by the trial court on the ground that hostility of the witness could not be determined until he had answered questions relating to facts at issue in a manner which demonstrated his hostility to petitioner (R. 76-79). Such questions need not be asked; hostility may be presumed.*** In the case at bar the Government had advised the court that the witness was its "special employee" (R. 46). This in itself established the witness' adverse interest. Similarly, the Government several times described Singh as a "confidential informant" (e.g., R. 43). Further, at one point the Government stated that disclosure to petitioner of Singh's identity might subject him to the possibility of injury or harm (R. 43). Under these circumstances, Singh's role was clear—he was a hostile witness.†

* Cf. *Sorrells* v. *United States*, 287 U.S. 435, 451, where this Court said with regard to entrapment prosecutions: "The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused. . . ."

** Cf. *Union Pacific Railroad Company* v. *Ward*, 230 F.2d 287, 296 (10th Cir. 1956); *Maryland Casualty Company* v. *Kador*, 225 F.2d 120, 123 (8th Cir. 1955); *United States* v. *Vayle*, 175 F.2d 110, 112 (9th Cir. 1949).

*** 3 Wigmore on Evidence (3d ed. 1940) 132, n. 1: "The bias of the witness may be *presumed* from his situation as to interest or relationship, before it is disclosed in his testimony; 1824, *Clarke* v. *Saffery*, Ry. & Mov. 126, Best, C.J. (one creditor of a bankrupt against another)". The *Clarke* case is cited as authority in *St. Clair* v. *United States*, 154 U.S. 134, 150.

† Cf. *Sorrells* v. *United States*, 287 U.S. 435, 451, where this Court said with regard to entrapment prosecutions: "The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused. . . ."

Moreover, the court not only improperly precluded petitioner from treating Singh as a hostile witness *ab initio*, but it also sustained an objection to the line of questioning designed to show that hostility (R. 76-77).

The net result of the rulings as to hostility was to deny petitioner effective examination of a most material witness. An illustration of the extent to which this occurred is the fact that petitioner was never even able to determine Singh's relationship with the Government (R. 81).

During his examination of Singh, petitioner sought to question Singh as to whether or not he had been arrested in the last six months for narcotics violation. To this, the court incorrectly sustained an objection (R. 85). Subsequently, petitioner sought Singh's record of narcotics convictions, but was improperly limited to the question of felonious convictions (R. 86).

It is true that an impeachment of a witness by an attack on his moral character may usually not be done by reference to mere arrests and non-felonious convictions. Here, however, the impeachment of Singh was to be done by showing his bias, since it is common knowledge that informants are often persons subject to the threat of prosecution.*

In *Alford* v. *United States*, 282 U.S. 687, the trial court refused to allow defendant to bring out the fact that the prosecution witness was being held in federal custody. This Court held this to be reversible error, saying:

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* See Donnelly, "Judicial Control of Informants", 60 Yale L.J. 1091, 1092 (1951).

Cf. *Dist. of Columbia* v. *Clawans*, 300 U.S. 617, 630-631 ". . . Common experience teaches us that the testimony of [private police], especially when uncorroborated, is open to the suspicion of bias, . . ."

"The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution. [Citing authority.] Nor is it material, as the court of appeals said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention. [Citing authority.]" (282 U.S., at 693)

Numerous other cases have held it improper to preclude inquiries as to whether a prosecution witness might benefit from his testimony by being treated lightly in pending proceedings.* Where the defendant is required to call a confidential informer in order to sustain the defense of entrapment, the same rule should be applied.

The trial court sustained various other objections to the examination of Singh and Lieuanan which it should not have sustained. Thus, the court (1) held irrelevant and immaterial the question of Lieuanan's and Singh's previous transactions together (R. 54); (2) held that a foundation was required for examination of Singh's arm (such examination was intended to demonstrate Singh's current use

* E.g., see *Gordon* v. *United States*, 344 U.S. 414, 421; *United States* v. *Hogan*, 232 F.2d 965, 967 (3d Cir. 1956); *Sandroff* v. *United States*, 158 F.2d 623, 628 (6th Cir. 1946).

of narcotics,* since Singh had testified that he had previously used such drugs but had ceased their use three or four months previously) (R. 81-83); and (3) sustained objections to the following questions propounded by petitioner to Singh:

(a) "Are you an employee of the United States government?" (Objected to as leading and calling for a conclusion (R. 81).)

(b) "Will you describe for the jury your present relations with the United States government?" (Objected to as too remote (R. 81).)

(c) "Are you presently engaged in narcotic activity on behalf of the United States government?" (Objected to as argumentative, irrelevant and immaterial (R. 81).)

Petitioner was materially prejudiced by the limitation of his examination of Singh. Only through effective cross-examination could he have had a fair opportunity to extract from Singh facts which would be contrary to the Government's interest. Further, once Singh testified adversely it was imperative that petitioner be allowed to demonstrate Singh's bias, particularly since petitioner had called Singh as a witness and the jury would be likely to give this fact certain significance. Since agent Lienanan's testimony and petitioner's were directly contrary, Singh's testimony was crucial to the entrapment defense. Under these circumstances if the trial court's rulings were, as we believe, in error, they are clearly errors requiring reversal.

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* See *Fletcher* v. *United States*, 158 F.2d 321, 322 (D.C. Cir. 1946): ". . . the well recognized fact that a drug addict is inherently a perjurer where his own interests are concerned. . . ."

IV.

The Throwing of Narcotics by Petitioner Toward the Arresting Officer, Following Petitioner's Gunpoint Arrest, Did Not Constitute a "Sale" Within the Meaning of 21 U.S.C. § 174.

While Section 174 of Title 21, U.S.C., proscribes many acts, the fifth count of the indictment against petitioner charges only the act of sale and facilitation of the sale of a specific parcel of narcotics to Licuanan and Segura on May 21, 1958 (R. 3). With respect to that fifth count, under which petitioner received ten of his twenty-year sentence,* petitioner contends that he was not convicted of the crime for which he was indicted and tried—to wit, selling**—but rather that he was convicted for his act of *almost* selling.

At the trial, the Government's witnesses Licuanan and Peterson each testified that Licuanan placed petitioner under arrest while petitioner still had possession of the narcotic drug and before petitioner made any attempt to transfer the drug to anyone (R. 42-43; 64-65).† This tes-

* The sentence on count five is not concurrent with the sentence on any other count.

** The facilitation charge was removed from the case by the district court at the time it denied the government's request for an instruction defining the word "facilities" (R. 73).

† Agent Peterson testified, ". . . after Agent Licuanan pulled his gun, [petitioner] threw this bag at Agent Licuanan and ran . . ." (R. 64-65).

Agent Licuanan testified, ". . . I then ran towards the car and I placed Saldana . . . under arrest. Then Saldana threw the paper bag to me and started running" (R. 42).

In addition, the following colloquy occurred between Licuanan and the court:

"The Court: Who threw the bag?
The Witness: Defendant Saldana.
The Court: Threw it on the ground, or the street?
The Witness: No, he threw it at me.

(footnote continued on next page)

timony was given support both by prosecution witness Segura (R. 71) and by petitioner (R. 98). This testimony was not contradicted in any way nor was there any testimony that any money or other consideration had passed from Licuanan or anyone else to petitioner.

The word "sale" is used in narcotic statutes in its ordinary and popular sense. *Affronti* v. *United States*, 145 F.2d 3 (8th Cir. 1944). In the ordinary and popular sense, a sale is the transfer of the property in goods in exchange for money. *Ratigan* v. *United States*, 88 F.2d 919 (9th Cir. 1936), *cert. den.*, 301 U.S. 705, *reh. den.*, 302 U.S. 774. Without such transfer of the property, there might be an attempted sale of contraband (e.g., *State* v. *Fields*, 115 Kans. 489, 223 Pac. 285 (1924)) or an executory contract of sale (e.g., *Fox* v. *United States*, 34 F.2d 99 (4th Cir. 1929); *Filiatreau* v. *United States*, 14 F.2d 659 (6th Cir. 1926)), but there can be no sale. In the instant case, there was no transfer of the property in the narcotics involved in count five.

The Court of Appeals recognized that there had been no transfer of the property and no sale as alleged in count five as of the time that the government agent (Licuanan) pulled his gun and told petitioner he was under arrest. However, a majority of the Court of Appeals held that a sale might have been consummated by petitioner's throwing of the bag containing the narcotics at Licuanan immediately thereafter.

This holding is incorrect in several particulars. The majority view is that the question of whether petitioner intended to complete delivery of the narcotics by throwing

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The Court: Oh he threw it at you?
The Witness: Yes, sir, and it fell on my feet.
The Court: That was after you told him he was under arrest?
The Witness: That's right, sir" (R. 43).

them cannot be determined as a matter of law since the question involves petitioner's state of mind. By contrast, the dissenting Judge correctly concluded that the fact that state of mind is involved does not automatically make the issue one for the jury, that the issue must be taken from the jury if the evidence is inconsistent with the finding of the requisite intention, and that the hypothesis that petitioner was intending to complete a sale was totally inconsistent with the uncontroverted facts.*

Further, the opinion of the majority below ignores the fact that the entire course of conduct between petitioner and Licuanan, theretofore a complete stranger to petitioner, contemplated a cash sale—i.e., one where payment of the purchase price is a condition to the passing of the property in the goods. All the evidence in this regard shows that a cash sale was contemplated and that there was no extending of credit. As testified to by the Government's witnesses, the course of conduct was that immediately upon petitioner's delivery of the packages containing the narcotics to Licuanan and the verification of the contents by Licuanan, Licuanan would pay to petitioner in cash the agreed-upon sum (R. 33; 36; 38-39). No evidence to the contrary on which the jury could find an extension of credit or anything other than a cash sale was ever submitted. Likewise, there was no evidence that any cash had passed from Licuanan to petitioner at the time of the purported delivery on the fifth sale, or at any other time with reference to the fifth sale.

Accordingly, there being no evidence that any cash had passed from Licuanan to petitioner at any time with refer-

* Judge Hamley said, "I do not find a single circumstance surrounding the event which would tend to show that Saldana had a deliberate and voluntary intention of consummating the sale" (R. 10).

ence to the fifth sale, no sale occurred even if it be assumed *arguendo* that delivery took place. In *Marx* v. *United States*, 86 F.2d 245 (8th Cir. 1936), the court reversed a "sale" conviction, notwithstanding delivery of the contraband to the buyer's car as agreed. The court held that a cash sale was involved, that the payment of the purchase price was a condition precedent to the passing of title, that the purchase price had not been paid and hence that the sale had not been completed.

The views expressed by Chief Justice Marshall in *United States* v. *Wiltberger*, 5 Wheat. (18 U.S.), 76, 96, and reaffirmed in *Yates* v. *United States*, 354 U.S. 298, 305, are particularly appropriate in this case:

> "It will be dangerous indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

Petitioner did not "sell" the narcotics as charged in count five. Yet the jury was allowed to convict him of this offense.

V.

The Entrapment Instruction Was Erroneous.

While the defense of entrapment is one of man's earliest recorded pleas,* it was not until forty-five years ago, in *Woo Wai* v. *United States*, 223 Fed. 412 (9th Cir. 1915), that a federal court held entrapment to be a valid defense

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* Eve, when accused of eating the forbidden fruit, protested "The serpent beguiled me, and I did eat." Genesis 3:13. The plea was disallowed.

This Court in *Sorrels* v. *United States*, 287 U.S. 435, and more recently, in *Sherman* v. *United States*, 356 U.S. 386, and *Masciale* v. *United States*, 356 U.S. 386, firmly recognized the defense of entrapment and set forth the controlling law.

In the above cases this Court held that the defense of entrapment is an issue for the jury and not for the court. However, this Court has not heretofore set forth any rules regarding the type of instruction to be given the jury with respect to entrapment. In the case at bar the instruction (1) misleads the jury as to the nature of the entrapment defense and (2) improperly allocates the burden of proof.*

The entire entrapment instruction is founded on the proposition explicitly set forth therein, that "the law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment." In short, the defense which is commonly known as entrapment is denominated in the instruction as "unlawful entrapment." This Court has never used or sanctioned the use of any denomination other than "entrapment."

An instruction which talks in terms of "unlawful entrapment" and "lawful entrapment" can serve only to confuse the jury. Such instruction implies, incorrectly, that there are courses of conduct which constitute entrapment in the legal sense but which are not defenses in a criminal proceeding. Such instruction implies, incorrectly, that the jury is to determine the lawfulness of the conduct of the entrappers. Such instruction places an unwarranted burden on the defendant by compelling a discussion of the facts in the light of an invalid distinction within a classification

* The entrapment instruction (R. 140-141) is set forth verbatim in the Appendix. The given instruction is, and was intended to be (R. 100), substantially the same as one composed by Judge Mathes of this district, and reported at 20 F.R.D. 231, 278-279.

which is in itself unfamiliar and confusing to the jury. This gratuitous addition to the historic definition of the defense of entrapment can serve only to render improbable, if not impossible, proper consideration by the jury. As this Court stated in *Bollenbach* v. *United States*, 326 U.S. 607, 613: "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

As to the second point of prejudicial error, the instruction on entrapment misleads the jury as to the burden of proof. While the burden of proof is not specifically mentioned in the entrapment instruction, that instruction, in effect, directs the jury to decide the issue merely by balancing the evidence.* The proper rule is that, once inducement by the Government is shown,** the burden is on the Government to prove beyond a reasonable doubt that the inducement was not the cause or creator of the crime. *United States* v. *Masciale*, 236 F.2d 601 (2nd Cir. 1956), aff'd 356

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* ". . . If, then, you the jury should find from the evidence that before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as those that are charged in the indictment whenever opportunity was offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment. If, on the other hand, the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good defense and the jury should acquit the accused" (R. 141).

** Inducement was present in the instant case. The testimony by the Government's witnesses shows that Lieuanan and Singh, the confidential informer, both previously unknown to petitioner, came to him with a note to petitioner from his cousin (R. 47-48). The note stated that the cousin was in jail and that Singh was going to help raise bail (R. 126). Lieuanan pretended that he was a peddler looking for a source of supply and that he would use some of the profits to help the cousin (R. 47-48). Petitioner testified that initially he refused to attempt to obtain narcotics but was persuaded to do so to help his cousin (R. 91).

U.S. 386; *United States* v. *Silva*, 180 F.2d 557 (S.D.N.Y. 1959).

The entrapment instruction must specifically state the rule re burden of proof. A general instruction re burden of proof elsewhere in the charge is insufficient to advise the jury of the Government's burden re entrapment. *United States* v. *Landry*, 257 F.2d 425 (7th Cir. 1958). This is particularly true where, as here, the entrapment instruction is actually misleading as to the burden of proof.

The vital present-day importance of the defense of entrapment needs no amplification to this Court, and any undermining of the entrapment defense should not be tolerated. Least of all should any undermining be condoned in the charge to the jury, particularly where the only proper issue for the jury is entrapment.

Conclusion

A. Relief With Respect to the First Question Presented (Delay in Sentencing).

Petitioner has been seriously prejudiced as a result of the delay in imposing sentence. We respectfully urge that the dictates of both the Sixth Amendment and Rule 32(a) of the Federal Rules of Criminal Procedure, as well as concern for the orderly administration of the criminal law, require that his conviction be reversed and the indictment dismissed, as to all counts. Further prosecution or the imposition of sentence after such a delay would in our view be unlawful.

Should this Court hold, however, that the unreasonable delay in sentencing petitioner does not warrant dismissal of the indictment, then we urge that petitioner is entitled, at the very least, to be relieved of all prejudice attributable

to that delay.* In such event, petitioner requests that this Court enter an order which would restore petitioner, insofar as possible, to the position he was in at the time formal completion of the five-year sentencing proceedings was improperly postponed on June 26, 1958.

We respectfully suggest that this result could be accomplished by one of two means—(1) by allowing the judgment of conviction on count two to stand and reversing the judgment of conviction on the other counts, or by (2) reversing the entire judgment of conviction and remanding to the district court for sentencing upon the plea of guilty to count two. Petitioner hereby waives** any right to reversal of judgment on count two, unless this Court holds that petitioner is entitled to relief from all punishment and prosecution for offenses covered by the indictment. For the five-year sentence imposed on count two by Judge Hall is the minimum permitted by law (21 U.S.C. §174), and is the same sentence which would have been imposed but for an improper delay. If, however, this Court determines to remand this case to the district court for sentencing, we respectfully urge that it be remanded to District Judge Clarke with directions to impose the five-year sentence previously announced by him. In either event, the district court should be directed to enter a *nunc pro tunc* order making petitioner's sentence effective as of June 26, 1958

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* "American criminal procedure has its defects, though its essentials have behind them the vindication of long history. But all systems of law, however wise, are administered through men and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism."

Dissenting opinion of Mr. Justice Frankfurter, *Rosenberg* v. *United States*, 346 U.S. 310.

** Petitioner has expressly authorized counsel, in writing, to make this waiver before this Court.

and to dismiss the indictment as to counts three, four and five.

B. Relief With Respect to the Second Question Presented. (Vacation of Guilty Plea and Subsequent Trial.)

Acceptance of the plea of guilty on counts one and two barred any further prosecution of counts three, four and five. Therefore, we urge that the judgment of conviction as to counts three, four and five be reversed and that this Court direct the district court to dismiss the indictment thereon.

Acceptance of the plea of guilty on counts one and two left the district court with no alternative but to impose sentence. However, that plea has now been vacated by the district court. The vacation of that plea cannot serve to eliminate petitioner's former jeopardy thereon. Having been once in jeopardy, petitioner may not now be required to plead again or submit to any further prosecution.* Accordingly, we urge that the judgment of conviction on count two be reversed and that this Court direct the district court to dismiss the indictment thereon.**

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* Cf. *United States* v. *Sabella*, 272 F.2d 206 (2d Cir. 1959), where the Second Circuit held that former jeopardy remained as a defense in spite of the trial court's vacation of the pleas of guilty which placed the defendant in jeopardy initially.

** Count one has been finally disposed of by virtue of petitioner's acquittal thereon at the close of the prosecution's case in chief. Cf. *Ball* v. *United States*, 163 U.S. 662, 669-670:

"... An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. (Citing authority.) But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. . . . If the judg-

In the event that this Court does not agree that petitioner is now free from the imposition of punishment on count two, then we would under ordinary circumstances request that the judgment be reversed on the post-trial convictions and that the case be remanded for sentence on the guilty plea on count two. However, we believe that requiring the resentencing of petitioner on that count would be a useless act, since he was prejudiced by the trial on that count but not by the length of the sentence imposed thereon. Accordingly, if this Court agrees that the judgment and indictment as to counts three, four and five must be dismissed, but concludes that petitioner may now be sentenced on count two, then petitioner waives any right to reversal on count two and respectfully asks that the sentence previously imposed thereon be permitted to stand.* Petitioner has already served more than two years of the sentence now in effect, the five-year term previously imposed on count two is the minimum sentence permitted by statute, and that sentence was deemed to be the appropriate punishment on count two by both district judges involved.

If, however, this Court determines that, despite petitioner's waiver, a new sentence on count two is required, then we respectfully urge that this case be remanded for such proceedings to the district judge who accepted the plea of guilty** and not to the district judge who purported

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ment is upon an acquittal, the defendant indeed, will not seek to have it reversed; and the government cannot."

While the trial violated Saldana's constitutional rights the court was not without jurisdiction of the cause or the party, and no appeal has been taken from the judgment of acquittal on count one. Accordingly, the acquittal on count one is final.

* Petitioner has expressly authorized counsel, in writing, to make this waiver before this Court.

** As a matter of practice in this district, the judge who takes the plea imposes the sentence. This appears to be the rule gen-

to vacate that plea." We further urge that in view of the announcement by the district court of petitioner's five-year sentence on June 26, 1958, this Court under its supervisory power over the administration of justice direct that the word of the district court be kept, and that a five-year sentence be imposed, effective as of June 26, 1958.

C. Relief With Respect to the Fourth Question Presented. ("Sale" by Throwing Narcotics After Arrest.)

Petitioner's motions for judgment of acquittal made at the conclusion of the prosecution's case in chief and of the trial should have been granted as to this count. The evidence as to this count is undisputed, and all witnesses are in agreement as to the facts. Accordingly, there is no possibility that on retrial a conviction could be obtained. Therefore, the judgment of conviction on count five should be reversed and the district court directed to dismiss the indictment thereon.

D. Relief With Respect to the Third and Fifth Questions Presented. (Trial Errors re Witness Singh and Entrapment Instructions.)

If this Court denies in its entirety the relief heretofore sought, then we urge that the judgment of conviction on

erally. E.g., see *Owens* v. *Hunter*, 160 F.2d 971, 972 (10th Cir. 1948): "... Ordinarily sentence should be imposed by the judge before whom the conviction was had. ..."

* Judge Hall's reason for assuming jurisdiction was that he wished to sentence petitioner because he was scheduled to preside over the trial of petitioner's co-defendant. That co-defendant having fled the country, the reason for Judge Hall's assumption of jurisdiction has disappeared. Furthermore, in view of the record in this case, we believe that, if a new sentence must be imposed, this should be done by some other judge. Cf. *Miller* v. *United States*, 321 U.S. 752.

counts two, three, four and five be reversed on the alternative grounds of (1) deprivation of a fair trial (third question), or (2) erroneous trial instructions (fifth question). Similarly, if this Court orders the district court to dismiss the indictment on count five but denies all other relief heretofore requested, we urge that the judgment of conviction on counts two, three and four be reversed on the above alternative grounds.

Respectfully submitted,

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APPENDIX A

ENTRAPMENT INSTRUCTION GIVEN BY THE DISTRICT COURT

(R. 140-141)

"In this case the defendant has raised the question of entrapment. In that connection, you are instructed that the accused here offers the defense of unlawful entrapment as to each crime charged in the indictment, as to each of the counts. The law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. When a person has had no previous intent or purpose to violate the law but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids conviction in such a case. On the other hand, where a person already has the willingness and readiness to break the law the mere fact that the Government Agent provides what appears to be a favorable opportunity to break the law is no defense, but it is lawful entrapment.

"When, for instance, the Government has reasonable grounds for believing a person has engaged in the illicit sale of narcotics, it is not unlawful entrapment for a Government Agent to pretend to be someone else and to offer either directly or through an informer or other decoy to purchase narcotics from such suspected persons.

"If, then, you the jury should find from the evidence that before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as those charged in the indictment whenever opportunity was offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment. If, on the other hand, the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good defense and the jury should acquit the accused.

"You must consider the defense of entrapment as to each count of the indictment. It is a question of fact to be de-